

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEN E. FOSDICK)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,041,201
)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent requested review of the February 8, 2011 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on May 11, 2011.

APPEARANCES

George H. Pearson, of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed the sole issue to be determined in this appeal is the nature and extent of claimant's impairment.¹

¹ Originally claimant's entitlement to the unauthorized medical allowance and future medical benefits were disputed. But respondent announced that it no longer takes issue with the ALJ's determination on those issues.

ISSUES

The ALJ found the claimant to have an 8.5 percent functional impairment to the body as a whole for an injury to the low back.² In doing so, she averaged the two functional impairment ratings offered by the testifying physicians. Respondent's appeal followed.

Respondent contends that the testifying physicians inappropriately used the range of motion model in an effort to provide claimant with an artificially high impairment rating. Respondent maintains that those same physicians have testified that the *Guides* dictate that the injury model (commonly referred to as the DRE method) is the preferred method of rating an individual's impairment and based on that methodology, claimant's impairment is either 0 or 5 percent. And because Kansas law³ compels that all impairment ratings be made pursuant to the *Guides*, the claimant is entitled to either a 0 percent or a 5 percent rating.

Claimant argues that the ALJ's Award should be affirmed. Claimant contends that the *Guides* allow a physician to utilize the range of motion model as a differentiator when evaluating an impairment in those instances where the injured employee's condition does not belong in any given DRE category. Claimant goes on to argue that if the Board accepts respondent's argument, then taken to its logical conclusion, claimant's impairment should be 10 percent, for the reason that the range of motion model yields a rating that is closer to a 10 percent than a 5 percent impairment under the injury model.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award accurately and succinctly sets forth the facts and circumstances surrounding claimant's accident, his subsequent treatment and the testifying physicians' opinions and rationale for those opinions. The Board hereby adopts that recitation as its own.

² All impairment ratings referenced in this Order are to the body as a whole and were purportedly made pursuant to the 4th edition of the *Guides* (American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*). The parties expressly stipulated that the record is to include the entire contents of the *Guides*.

³ K.S.A. 44-510e(a).

After considering both physicians' testimony,⁴ the ALJ summarized the evidence and her conclusions as follows:

There were only two competent medical opinions presented as to the nature and extent of [c]laimant's impairment. Claimant does not have a wage loss so his impairment rating is limited to functional impairment only. One doctor's opinion is an eight percent impairment rating and the other is a nine percent impairment rating. Both doctor's [sic] opinions are equally credible. Therefore, it is found and concluded that [c]laimant's functional impairment is 8.5 percent to the body as a whole.⁵

Respondent has appealed and contends the ALJ erred in relying upon the physicians' 8 and 9 percent functional impairment. Distilled to its essence, respondent contends that both physicians improperly utilized the range of motion model in assigning impairment to claimant. Instead, respondent argues that those same physicians testified that the *Guides* themselves compel the rating physician to utilize the injury model if the patient's condition can be found within Table 70 within the *Guides*. And because claimant's condition can be found within Table 70, respondent believes the physicians' testimony authorizes either a category I (0 percent) or a category II (5 percent) permanent partial impairment. There is no justifiable reason, in respondent's view, to utilize the range of motion model other than to artificially increase claimant's impairment.

Claimant maintains that both physicians adequately and credibly explained why the injury model was insufficient in evaluating claimant's impairment. In Dr. Bieri's view, the range of motion model needed to be used because claimant sustained a 2 level injury process within his lumbar spine. Admittedly, had claimant not had a 2 level injury, he would likely have used the DRE method. But because of the multiple injury condition, he elected to use the range of motion model, based upon Table 75 at page 113, which yielded a 7 percent to the whole body. He also assigned an additional 2 percent for range of motion deficits, which when combined, yields a 9 percent whole body impairment, pursuant to the *Guides*.⁶ He also explained that the *Guides* provide that once a range of motion evaluation is done, the examiner can then consult the DRE categories and award an impairment that most closely approximates the range of motion result. In other words, once he found a 9 percent, the injured employee is then classified as a DRE III, which yields a 10 percent whole body impairment. But because claimant did not have true radiculopathy, Dr. Bieri concluded that claimant was more appropriately classified as

⁴ It is worth noting that both physicians were retained by claimant for purposes of this claim. Respondent provided no expert testimony as to the nature and extent of claimant's impairment. Rather, respondent's counsel relied upon his efforts to discredit each of the physicians as to their impairment opinions.

⁵ ALJ Award (Feb. 8, 2011) at 4.

⁶ Bieri Depo. at 7-8.

something less than a DRE III, and thus found claimant was entitled to a 9 percent whole body impairment.

Dr. Prostic used the range of motion model because he concluded that claimant's condition did not belong precisely in either a DRE II or III. Rather, his condition was somewhere in between. He assigned a 16 percent whole body impairment, taking into account claimant's protruding disk, 7 percent for loss of motion and 6 percent to the lower leg (for calf atrophy). But he felt the 16 percent was too high, given claimant's complaints. Thus, he consulted the DRE II, which yields a 5 percent whole body, and added an additional 3 percent to account for claimant's additional complaints. In sum, he believed the 8 percent whole body was more accurate when considering claimant's injury and his symptoms. He expressly testified that this methodology is accepted by the *Guides*.⁷

In making her decision, the ALJ averaged the two ratings of the physicians and awarded claimant an 8.5 percent whole body impairment. This appeal followed.

As noted above, both physicians independently elected to utilize the range of motion model, an approach that is, according to both Drs. Prostic and Bieri, appropriate and endorsed by the terms of the *Guides* themselves. Indeed, the *Guides* provide that:

In using the Injury Model, the physician or examiner may use certain clinical procedures or determinations in placing the patient's impairment in the proper category. These "differentiators" are described in Table 71 (p. 109) and are listed below.

No differentiator is required to place a patient in any impairment category. However, if a differentiator is present, it provides important evidence as to the category in which the patient **belongs**. (emphasis added)

Impairment Category Differentiators

...
Range of Motion Model⁸

That same section goes on to provide that:

The physician uses the estimate determined with the Range of Motion Model to decide placement within one of the DRE categories. The proper DRE category is

⁷ Prostic Depo. at 11.

⁸ AMA *Guides* at 3/99.

the one having the impairment percent that is closest to the impairment percent determined with the Range of Motion Model.⁹

Unlike the factual situation in *Overcash*¹⁰, here the only uncontroverted testimony offered on the issue of claimant's impairment endorses the two-step methodology in rating an injured employee's impairment. The rating physicians first consider the diagnosis and then consult Table 70 to see if the diagnosis is contained within that Table. If so, and the claimant neatly fits within the criteria, whether the claimant *belongs* in that category, then the rating can be easily determined. But if, as here, there is some question if the claimant fits neatly within any given category, the range of motion model can be consulted for purposes of aiding the rating physician at coming up with a final impairment number. Dr. Bieri explained that the range of motion model should closely approximate or validate the so-called diagnosis related estimate (injury model).¹¹ This analysis is further validated by the fact that according to Dr. Bieri, claimant has a two level injury, a fact that is not taken into account when utilizing the injury model for purposes of impairment.¹²

During cross examination, both physicians testified that the *Guides* compel a rating physician to utilize the injury model when evaluating an impaired individual's condition, if the diagnosis can be found within Table 70. But both physicians went on to say that claimant's condition encompassed more than was reflected by a category II impairment and that the range of motion was a more appropriate methodology of evaluating claimant's impairment.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.¹³ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.¹⁴

⁹ *Id.*

¹⁰ *Overcash v. State of Kansas*, Nos. 1,042,749 & 1,045,297, 2011 WL 800426 (Kan. WCAB Feb. 25, 2011).

¹¹ Bieri Depo. at 20.

¹² *Id.* at 21.

¹³ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.3d 395 (1974).

¹⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Physicians who become involved in workers compensation claims are compelled to use the 4th edition of the *Guides*.¹⁵ And while there is evidence within this record that indicates that the injury model (DRE) is preferred by the authors of the *Guides*, there is an alternative method provided for those instances where an individual's condition does not fall neatly within one category. This approach allows a physician to account for some variables and an allowance for a difference of opinion as it pertains to how to categorize any given injury. While it is clear that the intent of the AMA Guides (and of the Legislature in adopting that tool) was to achieve some sort of conformity, this does not mean that the rendering of an impairment opinion can be trusted to the uneducated and/or untrained. Indeed, the law requires impairment ratings to be established by competent medical evidence.¹⁶ The Board finds, based on the expert testimony offered by both Drs. Prostic and Bieri, the 8.5 percent impairment assigned by the ALJ should be and is hereby affirmed.

The Board notes respondent's strident argument that the law requires physicians to strictly utilize the *Guides* and that the *Guides* reflect the conclusion that the DRE method is the preferred method of rating an individual's impairment. But respondent's argument is significantly undermined given the fact that the *Guides* itself, which respondent so fervently maintains should be followed at all costs, provides that the range of motion model *can* be used when an injured employee's condition does not neatly fit within a DRE category. Indeed, were the Board to take each and every statement contained within the *Guides* as a mandate, the 4th Edition of the *Guides* could not be used as all.

The American Medical Association strongly discourages the use of any but the most recent edition of the *Guides*, because the information in it would not be based on the most recent and up-to-date material.¹⁷

As was noted during Dr. Bieri's deposition, there have been subsequent editions of the *Guides* and our Legislature has not yet seen fit to adopt the most recent version. Thus, we are compelled to use an out of date treatise to rate impairments, an act that is expressly discouraged by the *Guides*. This is not the only internal inconsistency presented in the *Guides*.

The *Guides* specifically state that:

¹⁵ See K.S.A. 44-510e(a).

¹⁶ *Id.*

¹⁷ AMA *Guides* at 1/5.

It must be emphasized and clearly understood that impairment percentages derived according to *Guides* criteria should not be used to make direct financial awards or direct estimates of disabilities.¹⁸ (emphasis supplied)

This directive is in direct contradiction to the Legislator's mandate that impairments be rendered pursuant to the *Guides*, if contained therein.

As discussed above, both physicians explained their understanding and approach when rating the claimant and both complied with the principles set forth in the *Guides*. Under these facts and circumstances, respondent's argument that they failed to comply with the statutory mandate is rejected. The Award is affirmed in its entirety.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated February 8, 2011, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent
Rebecca Sanders, Administrative Law Judge

¹⁸ *Id.*